Supreme Court, U.S.
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No. 98-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELECTRIC ENGINEERING COMPANY,

Petitioner,

vs.

CALPINE CORPORATION; WILLIAM B. BETCHART; ENERVEST CORPORATION and ENERVEST MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CALPINE CORPORATION AND WILL B. BETCHART

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QUESTIONS PRESENTED

ISSUE I

Did the Ninth Circuit abuse its discretion in affirming a sanctions order applying established law to a detailed factual record?

ISSUE II

Must this Court exercise its power of supervision because the Ninth Circuit found to be frivolous EEC's argument that twenty days means thirty-one days?

LIST OF PARTIES

The Petition lists most of the parties to the proceeding.

Calpine Corporation is a respondent. It has no parent companies and no nonwholly owned subsidiaries.

Will B. Betchart is a respondent. Mr. Betchart was an employee of Calpine Corporation.

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RESTATEMENT OF THE CASE

A. Introduction.

Petitioner Electric Engineering Company ("EEC") asks this Court to exercise supervisory power over the Ninth Circuit, arguing that the Ninth Circuit has far departed from the accepted and usual course of judicial proceedings. EEC asserts no other basis for this Court's jurisdiction. EEC challenges a Ninth Circuit opinion affirming dismissal of EEC's claims under FRCP 37, claiming that the lower courts unjustly punished EEC.

EEC misrepresents the proceedings below and the lower courts' rulings. No one unjustly punished EEC. Instead, the lower courts sanctioned EEC because of the courts' concern for the truth. In fact specific rulings, applying established precedent, the lower courts determined that EEC's conduct made the assessment of truth impossible, so that dismissal was the only remedy.

EEC's conduct included repeated violations of court orders, destruction of evidence, concealment of evidence, and false testimony about evidence, both by EEC and its counsel. Among other things, EEC and its attorneys concealed the Carroll memorandum, a critical piece of evidence which the Ninth Circuit called a "smoking gun." EEC's conduct prejudiced all parties to the litigation, including respondents Calpine Corporation and Will B. Betchart (collectively "Calpine"), as well as the Court.

B. EEC's Conduct.

In its opinion, the Ninth Circuit discussed EEC's conduct. Calpine will summarize significant findings.

> Electric Engineering had committed many discovery violations. The most critical had to do with hiding the [Carroll memorandum]. (Pet. App. 10a.)
>
> . . .
>
> For more than two years, Electric Engineering's lawyers violated court orders by failing to produce it. Several trial date settings had to be vacated because the discovery was incomplete. Warnings were given and monetary sanctions were imposed as Electric Engineering violated one court order after another. (Pet. App. 11a.)
>
> . . .
>
> The facts of the case at bar show dishonesty, not just recalcitrance and delay, regarding production of critical evidence.
>
> The Carroll memorandum was exceedingly important, as we have explained. It destroyed Electric Engineering's claim. . . . There was plenty of evidence that Electric Engineering, not just its lawyers, was doing its best to hide the memorandum. . . . (Pet. App. 17a.)

C. EEC Mischaracterizes the Magistrate Judge's Rulings.

1. The ruling on Credit Suisse's motion for sanctions.

EEC sued Calpine and Credit Suisse. Its claims against both were essentially the same. Credit Suisse made a motion for sanctions against EEC and its surety, American Home. The Magistrate Judge held two days of hearings. As the Ninth Circuit

found, he made a "meticulous analysis of all the evidence." (Pet. App. 11a.)

After the hearing, the Magistrate Judge issued findings and recommendations. He found that EEC and American Home had shared litigation interests. He noted past orders compelling EEC to comply with discovery, as well as issuance of substantial monetary sanctions against EEC. He found that EEC had willfully concealed the Carroll memorandum and willfully disobeyed earlier court orders.

The Magistrate Judge also reviewed notes prepared by American Home's counsel in a conversation with EEC's attorney. American Home's attorney had to produce the notes after the Court found a waiver of privilege. The notes referred to the Carroll memorandum. Before producing the notes, American Home's attorney obliterated the reference to the Carroll memorandum, but an expert later uncovered the reference. This was after testimony under oath by American Home's attorney, EEC's attorney, EEC's president, and Mr. Carroll denying any knowledge of the memorandum. The Magistrate Judge found the testimony to be "not credible."

The Magistrate Judge recommended as a sanction dismissal of EEC's claims. Before doing so, he considered the five factors identified in *Adriana International Corporation v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). He specifically considered, but rejected, imposition of a lesser sanction. He did not recommend his sanction to "unjustly punish" EEC. Instead, he recommended the sanction because of his concern for the truth. As the Magistrate wrote,

> EEC's conduct in the litigation has cast such a pall over EEC's integrity and upon a fair and just resolution on the merits that no alternative sanction

> could be effective. . . . [I]f the case were allowed to proceed, because of EEC's past conduct in this matter there could never be reasonable confidence that the merits had ever been fairly decided. (Pet. App. 66a.)

2. The ruling on Calpine's motion for sanctions.

Calpine asked the Magistrate Judge to extend the sanctions in Calpine's favor. The parties briefed and argued the issue, and the Magistrate recommended extending the sanction in favor of Calpine. He noted that the claims made by EEC against Calpine were essentially the same as the claims made against Credit Suisse, and it would not be just to allow EEC to continue to assert them against any party. He also found that American Home, acting in active concert with tacit agreement of EEC, destroyed the existence of the Carroll memorandum. The Magistrate Judge's findings and recommendations concluded with the following sentence: "Any party may file written objections to these findings and recommendations . . . within 20 days after service." (Pet. App. 39a.)

D. EEC Mischaracterizes Calpine's Involvement.

In the "undisputed facts" section of its petition, EEC describes Calpine's involvement in the litigation. Most of the facts listed are indisputably false.

EEC is correct that Calpine served EEC with a request for production of documents on July 9, 1991, but is incorrect when it asserts that EEC timely responded. EEC did not produce documents until February 4, 1992, seven months after the date of the request, when EEC's former counsel dumped five boxes of files in the office of Calpine's counsel. EEC's new counsel retrieved the documents on March 27, 1992, but before

Calpine's counsel reviewed them. As Calpine's counsel advised EEC's counsel, "I have not yet had the chance to review the documents, and I would like access to them again after your review." EEC later produced its documents, but without the Carroll memorandum. As the Ninth Circuit noted, "[o]nce the memorandum was in Electric Engineering's discovery materials retrieved by [new counsel], someone had to take the affirmative step of pulling it out."

Calpine actively participated in discovery in the case. It served multiple sets of requests for production of documents and interrogatories, both before and after delivery of EEC's documents to EEC's new counsel. Its attorney spent several weeks in depositions. Calpine also obtained an order compelling EEC to respond to Calpine's discovery.

E. EEC Mischaracterizes the District Court's Order.

The District Judge independently conducted a careful review of the Magistrate Judge's findings and recommendations. Responding to EEC's objections, he found that the weight of the evidence supported the finding that EEC deliberately suppressed the Carroll memorandum. He found concerted action by EEC and American Home to obliterate evidence and attempt to hide the memorandum. He also found that the memorandum undermined all of EEC's claims. Though Calpine's counsel had the memorandum, he returned EEC's documents before he had a chance to read them, understanding that he would get the documents back. When the documents were later produced, the Carroll memorandum was conspicuously absent.

The District Judge also considered the five *Adriana* factors, noting that the key factors "are fact sensitive." He specifically reviewed prejudice to the other parties and the availability of

less drastic sanctions, and determined that dismissal of EEC's claims was appropriate. He did not order dismissal to punish EEC. Instead, he found the Magistrate's determination a perfect expression of risk to the parties and the Court:

> [I]f the case were allowed to proceed, because of EEC's past conduct in this matter there could never be reasonable confidence that the merits had ever been fairly decided. (Pet. App. 66a.)

F. EEC Misrepresents the Ninth Circuit's Opinion.

EEC argues that the Ninth Circuit's affirmance was nothing more than unjust punishment. EEC concedes that sanctions are appropriate to advance ascertainment of truth, but not merely to punish an offending party. EEC also argues that the Ninth Circuit failed to consider the *Adriana* factors, and did not specify why it deemed EEC's appeal frivolous. EEC is wrong on all three points.

First, the Ninth Circuit affirmed because of its concern for the truth. In the Court's own words,

> There is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result. Sometimes, [cite], a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts. The District Court found that to be so in this case. (Pet. App. 19a.)
>
> . . .
>
> It took years to shake loose the Carroll memorandum. . . . Considering how Electric

> Engineering acted regarding the Carroll memorandum, it was a reasonable inference that if there was other discoverable material harmful to its case that its adversaries did not know about, it would be hidden forever. Where a party so damages the integrity of the discovery process there could never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate. It was on this record. (Pet. App. 20a.)

Second, the Ninth Circuit specifically considered each of the five *Adriana* factors. It noted that the Magistrate Judge and District Judge also expressly considered those factors. Reviewing the less drastic sanction factor, the Court noted:

> While contumaciousness toward the court needs a remedy, something other than case-dispositive sanctions will often suffice. Dismissal is appropriate where a "pattern of deception and discovery abuse made it impossible" for the district court to conduct a trial "with any reasonable assurance that the truth would be available." (Pet. App. 19a.)

Finally, the Court specified how EEC's appeal was frivolous. It noted that the Magistrate Judge provided in his written order that any party could file objections within 20 days after service. Service was April 22, but the objections were not filed until May 20, which was late. Reviewing EEC's argument that 20 days means 31 days, the Court found the argument to be frivolous. (Pet. App. 21a.) EEC makes the same frivolous argument in its petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT NEED NOT SUPERVISE THE NINTH CIRCUIT, WHICH HAS NOT FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

EEC asks this Court to exercise supervisory power over the Ninth Circuit, arguing that the Ninth Circuit has far departed from the accepted and usual course of judicial proceedings. EEC asserts no other basis for this Court's jurisdiction. As discussed below, there is no reason for this Court to grant certiorari.

A. The Ninth Circuit Did Not Abuse its Discretion in Affirming the Sanctions Order Where it Applied Established Law to a Detailed Factual Record.

In affirming terminating sanctions, the Ninth Circuit relied on established precedent including *Malone v. United States Postal Service*, 833 F.2d 128 (9th Cir. 1987), *cert. denied*, 488 U.S. 819, 109 S. Ct. 59 (1988) and *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019 (1991). The Ninth Circuit carefully applied the factors developed in these cases to the detailed factual record at hand.

This Court will not usually review a finding of fact concurred in by both courts below. *Comstock v. Group of Investors*, 335 U.S. 211, 213-14, 68 S. Ct. 1454, 92 L. Ed. 1911 (1948). In this case, the magistrate judge, the district court, and the Ninth Circuit all found that EEC's action in withholding crucial evidence warranted terminating sanctions. The

Restatement of the Case above sets out the findings of the courts below in more detail.

The Ninth Circuit reviewed the dismissal under Rule 37 for abuse of discretion and reviewed the district court's factual findings for clear error. Reviewing the issue of willfulness, the court found "ample support [in the record] for the conclusions reached by the magistrate judge and district court judge." In addition, reviewing EEC's challenge to the appropriateness of the Rule 37(b) sanction, the court found that case dispositive sanctions were appropriate on this record "[w]here a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts."

Contrary to EEC's misstatements of fact, the magistrate judge, the district judge, and the Ninth Circuit all found that EEC's actions met the standard of willfulness, fault, or bad faith. The magistrate judge found that EEC had willfully concealed crucial evidence and had willfully disobeyed earlier court orders. The district judge found that EEC deliberately suppressed crucial evidence and was involved in hiding and obliterating evidence. The Ninth Circuit found dishonesty regarding production of critical evidence. EEC's claims of abuse of discretion are simply not supported.

EEC claims that the Ninth Circuit's affirmance as to Calpine and Enervest can only be seen as an attempt to unjustly punish EEC. EEC is correct that there are constitutional limits on the powers of the courts to impose sanctions for failure to comply with judicial orders. If the power of the court is used merely to punish an offending party for contempt, rather than compel obedience to an order advancing ascertainment of the truth, due process is denied. *Hovey v. Elliot*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897).

In this case, despite EEC's misstatements, the power of the court was not used simply to punish EEC for contempt. It was precisely the concern for finding the truth that led the district court to impose the dismissal sanction. Similarly, the Ninth Circuit found that EEC had so damaged the integrity of the discovery process that there never could be assurance of proceeding on the true facts. It was the ascertainment of truth that concerned the courts below, not mere punishment.

EEC cites a trilogy of cases, including *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) in support of its unjust punishment and due process claims. However, this Court's ruling in *Societe* in no way conflicts with the Ninth Circuit's affirmance of dismissal sanctions in this case. This Court in *Societe* found a violation of due process when a party was penalized for its failure to comply with a production order where the failure to comply "was due to inability fostered neither by its own conduct nor by circumstances within its control." In *Societe*, Swiss law prohibited the production of the records ordered. This Court stated that:

> Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to the *inability, and not to willfulness, bad faith, or any fault of the petitioner.*

Societe, 357 U.S. at 212, 78 S. Ct. at 1096 (emphasis added).

In this case, EEC made no showing of any inability to comply with the order compelling production. EEC was able to comply; it refused to comply. In fact, EEC's actions were

like the actions in *Hammond Packing,* cited by EEC, where this Court found no violation of due process where a party was able to comply with a production order, but failed to do so. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 57 L. Ed. 530 (1909).

EEC further claims that the unjust punishment and violation of its due process rights "is true . . . especially where EEC committed *no violation vis-à-vis* Calpine, Betchart, and Enervest." However, as indicated in the Restatement of the Case above, EEC's assertions regarding lack of prejudice to Calpine are simply wrong. Calpine actively participated in discovery of the case. The courts below all found that EEC's conduct prejudiced all parties to the litigation, including Calpine.

EEC claims the district court erred in dismissing as to parties who did not file a motion for sanctions, citing a Rhode Island case that states that "a dismissal of a plaintiff's claim . . . as to defendants who have not sought such relief is improper and unauthorized." *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517 (R.I. 1979). Here, Calpine and Enervest petitioned the district court to extend the terminating sanctions in their favor, as well as Credit Suisse's. Thus, the district court did in fact grant relief only to those parties who specifically requested it, and it expressly dismissed EEC's claims as to Calpine and Enervest.

Established law and the detailed factual record clearly show that EEC was not unjustly punished, nor were its due process rights violated, either in the district court or in the Ninth Circuit. There is no error or question of importance requiring review by this Court.

B. The Ninth Circuit Correctly Found to be Frivolous EEC's Argument That 20 Days Means 31 Days.

In its appeal to the Ninth Circuit, and in its petition to this Court, EEC argues that 20 days means 31 days. The Ninth Circuit found this argument to be frivolous. EEC argues that this finding justifies this Court's jurisdiction.

EEC devoted half a page of its petition to a conversation between the Magistrate Judge and EEC's counsel. They discussed the time within which EEC must file objections to the Magistrate Judge's findings and recommendations. EEC's petition fails to disclose that the Magistrate Judge later issued a written order, stating that any "party may file written objections to these findings and recommendations . . . within 20 days after service." (Petitioner's Appendix 39a.)

As the Ninth Circuit found,

> Service was April 22, but the objections were not filed until May 20, which was late. Electric Engineering argues that intermediate weekend days should be excluded because the 20 days should be viewed as two 10-day periods, and weekends are excluded from 10-day periods under Federal Rule of Civil Procedure 6(a). The argument is frivolous. Rule 6(a) says intermediate weekends are excluded "[w]hen the period of time prescribed or allowed is less than 11 days." Twenty is more than 11. Allowing the three days for service by mail pursuant to Rule 6(e), and the extra day if the last day is Sunday under Rule 6(a), opposition was due Monday, May 16. (Petitioner's Appendix 21a.)

Despite this obvious conclusion, EEC argues that its objections were actually due on May 26, 1994, 31 days after service (allowing three days for service by mail). The counting error of EEC's counsel certainly does not justify this Court's supervision over the Ninth Circuit.

C. EEC's Misstatements of the Factual Record in Its Petition, Standing Alone, Warrant the Court's Denial of the Petition.

The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition. Rule 14(4). As detailed in the Restatement of the Case above, petitioner's misstatements of the factual record alone warrant denial of the petition.

CONCLUSION

The Court should deny EEC's petition for a writ of certiorari.

Respectfully submitted,

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